IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL NO.4515 OF 1997

with

FIRST APPEAL NO.4516 OF 1997

For Approval and Signature

The Hon'ble Mr. Justice S.K. KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?

2. To be referred to the reporters or not ?

3. Whether their lordships wish to see the fair copy of the judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

UNITED INDIA INSURANCE CO. LTD.
VERSUS
CHHATRASING PARBATSNG RATHOD

Appearance:
MR PV NANAVATI for the Appellant
MR SC SHAH for Respondent No.1
MR KG VORA for Respondent No.3
MS MEGHA JANI for Respondent No.4
None present for other Respondent

Coram: S.K. Keshote,J
Date of decision:18/11/1998

C.A.V. JUDGMENT

#. As these two Appeals have arisen out of one and common accident and from the common judgment and award of the Motor Accident Claims Tribunal (Aux.I), Ahmedabad (Rural), decided on 15th September, 1997 passed in MACP No.928 and 1126 of 1986, the same are being taken up for hearing together and are being disposed of by this common order.

#. The brief facts of the case are as under:
On 10.12.85 the claimant-respondent No.1 in these two appeals were travelling in a Jeep No.GAD-6192 on payment of fare. When the jeep reached near Dhanap village Patia Chiloda, National Highway No.8, one truck No.GTH-8891 driven by Ganeshbhai H. Parmar, the opponent No.1 in the claim application as a driver, collided with the said jeep and accident took place in which the respondent No.1 sustained injuries. It was the case of claimants-respondents before the tribunal that the accident has been caused because of rash and negligent driving of both the drivers of jeep and truck. The driver of the jeep died on the spot in this accident. The jeep was insured by United India Insurance Co. Ltd., the appellant herein and the truck was insured by the National Insurance Co. Ltd. The respondent No.2, the owner of the truck, Hiranand Transport Company filed a written statement and it is contended therein that he sold the truck to Shri Sureshchandra Lakhiyani, the respondent No.3 herein. He has further stated that this truck was insured by the insurer with the National Insurance Co. Ltd., Ahmedabad. The appellant insurance company filed a written statement in which it is submitted that the jeep was insured with it. After considering the evidence produced by the claimants and other side in these claim applications, the learned tribunal held that the accident has occurred due to equal negligence (50 - 50 %) on the part of both the drivers of the jeep and truck. On merits, the tribunal has granted compensation of Rs.71,300/= in MACP No.928 of 1986 and Rs.66,640/= in MACP No.1126 of 1988. The tribunal has further awarded interest to both the claimants at the rate of 12% per annum from the date of petition till realization alongwith proportionate costs. Before the Tribunal, the appellant - insurance company has raised contention that the jeep was a private jeep and the use

of the same was only for domestic purpose. The claimants-respondents were paid passengers therein. So the driver and the owner have made breach of terms and conditions of policy and the insurance company could not have been made liable for making payment of the amount of compensation together with interest thereon to the claimants-respondents. That contention of the insurance company was not accepted. Hence these Appeals before this Court.

#. Mr.P.V.Nanavati, learned counsel for the appellant contended that the learned Tribunal has committed serious illegality in holding the driver of the jeep to be negligent to the extent of 50% in this accident. It has next been contended that the jeep bearing registration number GAD 6192 is insured as a private car and the policy itself provides that it does not cover use for hire or reward or for organized racing, pace making, trial speeding, carry of goods other than samples in connection with any trade or business or use for any purpose in connection with motor trade and as in this jeep the claimants-respondents were paid passengers, the insurance company was not liable to indemnify the insurer for the amount of compensation awarded by the tribunal in favour of claimants-respondents. Carrying this contention further, the learned counsel for the appellant urged that the tribunal though accepted the version of the appellant that the persons were travelling in a private car as paid passengers by paying Rs.5/= with the knowledge of the owner, however erred in coming to the conclusion that the breach of the terms of the police is not proved. In his submission, a private vehicle would not have been used for hire or reward otherwise also it has no permit for using it as a commercial vehicle as required by Section 42 of Motor Vehicle Act, 1939. The learned counsel for the appellant, in support of his contention has made reference to the provisions of Section 2(15)(16) and (18) of the Motor Vehicles Act, 1939, and has also made reference to the decision of the Apex Court in the case of M/s.Shaikhpura Transport Co. Ltd. v. Northern India Transporters Insurance Co. Ltd. & Anr., reported in AIR 1971 SC 1624, and in the case of Bhoi Vanaji Dhulaji & Anr. v. Patel Shivabhai Kashibhai & Ors., reported in 1981 ACJ (Guj.) 107.

#. On the other hand, the learned counsel for the respondents supported the award of the tribunal.

#. I have given my thoughtful considerations to the submissions made by learned counsel for the parties.

#. From the contention of the learned counsel for the appellant, the crux thereof is the fact that the tribunal has accepted that the claimants-respondents No.1 in both these appeals were travelling in a private car as paid passengers with the knowledge of the owner. However, this contention is wholly devoid of any substance and further in total misreading of the judgment and award of the Tribunal. I find from the impugned award that the tribunal has recorded categorically finding that there is nothing on the record which proves that the driver of the jeep had allowed unauthorized persons to travel in the jeep in the knowledge of the owner. Much emphasis has been laid on the fact that the claimants-respondents have admitted that they travelled in the jeep as paid passengers. It is true that this admission is there but there is no admission of the claimants-respondents that the driver has permitted them to travel in the jeep as paid passengers under the instructions or knowledge of the owner of the jeep. The learned counsel for the appellant is unable to show from the award of the tribunal as well as from the record of the case that there is any material evidence to show and establish that the claimants-respondents were travelling as paid passengers in the jeep with the knowledge of the owner. The insurance company has also failed to prove and establish that the owner of the jeep has authorized or permitted the driver to carry in the jeep the paid passengers. The Full Bench of this Court in the case of New India Assurance Company Ltd. v. Kamlaben, wd/o.Sultansinh Hukumsinh Jadav & Ors., affirming earlier decision of the Full Bench of this Court in the case of New India Assurance Co.Ltd. v. Nathiben, reported in 1993(1) GLR 779 held that the insurer in order to successfully disclaim his liability on the ground mentioned in Section 96(2)(b) of the Motor Vehicles Act, 1939, has to establish:

(i) that on the date of the contract of insurance, the insured vehicle was expressly or implicitly not covered by a permit to carry any passenger for hire or reward,

(ii) that there was a specified condition in the policy which excluded the use of the insured vehicle for the carriage of any passenger for hire or reward,

(iii) that the vehicle was, in fact, used in breach of such specified condition on the occasion giving rise to the claim by reason of the carriage of the passenger therein for hire or reward, and

(iv) that the vehicle was used by the insured or at his instance in breach of specific conditions including a condition that in the goods vehicle passengers for hire or reward were not to be carried. It it is done without knowledge of the insured by the driver's acts or omissions, the insurer would be liable to indemnify the insured.

Reference may have to another decision of the learned single Judge of this Court in the case of National Insurance Company Ltd. v. Premji M. reported in 1995(2) GLR 1352, wherein it is held that in case where the insurer has no knowledge about his driver having taken passengers for hire or reward then notwithstanding the acts exclusionary clause contained in the policy, insurer would be liable to indemnify insurer.

#. In this case, the Insurance Company on which burden lies has failed to prove and establish that the insurer had knowledge about the driver having taken passengers for hire and reward in the vehicle. So in the facts of the present case, notwithstanding exclusionary clause contained in the policy, the insurer was liable to indemnify the insurer.

#. Section 96(2)(b) of the Motor Vehicle Act, 1939 provides that the insurer shall be entitled to defend the action on the ground that there has been breach of specified condition to the policy, i.e. a condition excluding the use of vehicle for hire or reward where the vehicle is on the date of the contract of insurance of vehicle not covered by a permit to ply for hire or reward.

#. The Apex Court in the case of Sohan Lal Passi v. P.Sesh Reddy & Ors., reported in 1997(2) GLR 1093, while dealing with the question of liability of the insurance company in respect of third party risk with reference to Section 96 of the Motor Vehicles Act, 1939, in para-12 observed:

"...To examine the correctness of the aforesaid view this appeal was referred to a three Judge Bench, because on behalf of the insurance company, a stand was taken that when Sec.96(2)(b)(ii) has provided that the insurer shall be entitled to defend the action on the ground that there has been breach of a specified condition to the policy, i.e., the vehicle should not be driven by a person who is not duly licensed, then the insurance company cannot be

held to be liable to indemnify the owner of the vehicle. In other words, once there has been a contravention of the condition prescribed in sub-sec.2(b)(ii) of Sec.96, the person insured shall not be entitled to the benefit of sub-sec(1) of Sec.96. According to us, Sec.96(2)(b)(ii) should not be interpreted in a technical manner. Sub-sec.(2) of Sec.96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub-sec.(2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression `breach' occurring in Sec.96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was wilful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under sub-sec.(1) of Sec.96. In the present case, far from establishing that it was the appellant who had allowed Rajinder Pal Singh to drive the vehicle when the accident took place, there is not even any allegation that it was the appellant who was guilty of violating the condition that the vehicle shall not be driven by a person not duly licensed. From the fact s of the case, ti appears that the appellant had done everything within his power inasmuch as he has engaged a

> licensed driver Gurbachan Singh and had placed the vehicle in his charge. While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the material son record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-sec.(1) of Sec.96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

##. Reference may have to another decision of Apex Court in the case of B.V.Nagaraju v. Oriental Insurance Co.Ltd., Divisional Office, Hasan, reported in 1997(2) GLR 1382 where it is held that, "...misuse of vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which, by themselves, had gone to contribute to the causing of the accident..."

##. In the case in hand, the learned tribunal was perfectly legal and justified to hold the appellant liable to indemnify to insure for its liability for payment of compensation to the claimants-respondents applying the principle as laid down by the Full Court in Kamla (supra) case. On facts, the Tribunal has decided against the appellant that the vehicle was used for the breach of special conditions by the insurer or at his instance or within his knowledge. The award of the learned Tribunal does not call for interference of this Court.

##. In the result, these Appeals fail and the same are dismissed with no order as to costs.

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(sunil)